

## **Derby City Council Enforcement Policy**

### **Leasehold Reform -Ground Rent**

#### **THIS IS NOT STATUTORY GUIDANCE**

Derby City Council (“the Council”) has adopted this policy on deciding financial penalties and/or recovery orders under the [Leasehold Reform \(Ground Rent\) Act 2022](#) (“the Act”), with reference to the considerations prescribed in the [Department for Levelling Up, Housing and Communities’ (DLUHC) [Statutory Guidance for Enforcement Authorities](#)] (“the statutory guidance”).

The Act uses the terms “landlord” and “tenant” though this policy, as well as the statutory guidance, use the terms “landlord” and “leaseholder” respectively. The statutory guidance states that a leaseholder is a tenant who owns a leasehold interest in property, granted by a person (the landlord) who holds the freehold interest or a superior leasehold interest in that property<sup>1</sup>.

This policy applies to any decision made by the Council in its capacity as an “enforcement authority” under section 8 of the Act.

### **1. Sanctions Overview**

#### **Financial Penalties**

The Act provides that the Council may impose financial penalties from a minimum of £500 up to a maximum of £30,000 for a relevant breach of section 3(1) of the Act, where the Council is satisfied beyond a reasonable doubt that a relevant breach has occurred.

#### **Recovery Orders**

The Act also provides that the Council may order the landlord, or a person acting on their behalf, who received payment of the prohibited rent<sup>2</sup> in breach of section 3(1) of the Act to refund the leaseholder who paid it, where the Council is satisfied on the balance of probabilities that a relevant breach has occurred.

The Council cannot order a person to refund the prohibited rent if a leaseholder has made an application under section 13 of the Act to the First-Tier Tribunal (Property Chamber) in England or the Leasehold Valuation Tribunal in Wales (in either context we will refer to the relevant forum as “the Tribunal”) in relation to the same payment.

Where any part of two or more payments of a prohibited rent made by a leaseholder under the same lease have not been refunded, the Council may make a single order in respect of all the prohibited rent that has not been refunded.

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<sup>1</sup> Paragraph 10 of the [DLUHC Statutory Guidance](#) and Paragraph 2.6 of the [Welsh Government Statutory Guidance](#)

<sup>2</sup> Section 10(2) [Leasehold Reform \(Ground Rent\) Act 2022](#)

## Process

The decision to issue, and the process of issuing, a financial penalty and/or a recovery order happens in multiple steps:

- An investigation into the alleged breach of the Act
- Determination of the severity of the breach
- A notice of intent to issue a financial penalty and/or a recovery order
- A period for written representations
- Review of those representations, if provided
- A final notice imposing the financial penalty and/or recovery order

The Council may serve a single notice of intent and a single final notice in respect of both a financial penalty and a recovery order<sup>3</sup>.

## Other types of enforcement action that may be taken

The Council will determine the most appropriate and effective sanction and whether to impose a financial penalty and/or a recovery order. In suitable circumstances, consideration will be given to less formal action such as warning letters or advice to secure compliance, in accordance with the relevant enforcement policy of the Council.

## 2. Determining the level of financial penalty

In accordance with the provisions of the statutory guidance, the following factors will be considered by the Council when determining the level of financial penalty to impose for a breach of the Act:

- Severity of the breach
- Starting point and range
- Aggravating and mitigating factors
- Fairness and proportionality

Although the Council has discretion in determining the appropriate level of financial penalty, within the limitations set out by the Act, regard has been given to the statutory guidance when creating this policy.

### Step 1 – Determining the Severity

The more serious the breach, the higher the penalty will be.

The Council will assess the severity of the breach using the culpability and harm factors set out below. The listed factors are not exhaustive, and where a breach does not fall squarely into a category, individual factors may require a degree of weighting to make an overall assessment. Other discretionary factors may also be applied in order to reflect consistency and the Council may consider decisions in other UK jurisdictions where they contain some relevant and persuasive content.

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<sup>3</sup> Schedule ss.2(2) and 5(3) [Leasehold Reform \(Ground Rent\) Act 2022](#)

## Culpability

Where there is higher culpability, there will be a higher financial penalty.

|                                   |   |
|-----------------------------------|---|
| <b>Very High</b><br>(Deliberate*) | Where the landlord intentionally breached, or flagrantly disregarded, the law or has/had a high public profile and knew their actions were unlawful.  |
| <b>High</b><br>(Reckless*)        | Actual foresight of, or willful blindness to, risk of a breach but risk nevertheless taken.   |
| <b>Medium</b><br>(Negligent*)     | Breach committed through act or omission which a person exercising reasonable care would not commit.  |
| <b>Low/No</b>                     | Breach committed with little fault, for example, because: <ul style="list-style-type: none"><li>• significant efforts were made to address the risk although they were inadequate on the relevant occasion</li><li>• there was no warning/circumstance indicating a risk</li><li>• failings were minor and occurred as an isolated incident</li></ul> |

\* These are the terms used in the statutory guidance.

## Harm

Where there is greater harm caused, there will be a higher financial penalty.

The following factors relate to both actual harm and risk of harm. Dealing with a risk of harm involves consideration of both the likelihood of harm occurring and the extent of it if it does.

|  |  |
|--|--|
| <b>High</b><br>(High Likelihood of Harm)     | <ul style="list-style-type: none"><li>• Serious adverse effect(s) on individual(s) and/or having a widespread impact due to the nature and/or scale of the Landlord's business</li><li>• High risk of an adverse effect on individual(s) – including where persons are vulnerable</li></ul>  |
| <b>Medium</b><br>(Medium Likelihood of Harm) | <ul style="list-style-type: none"><li>• Adverse effect on individual(s) (not amounting to "high" harm - above)</li><li>• Medium risk of an adverse effect on individual(s) or low risk of serious adverse effect.</li><li>• Leaseholder and/or landlords substantially undermined by the conduct.</li><li>• The Council's work as a regulator is inhibited</li><li>• Leaseholder or prospective leaseholder misled</li></ul> |
| <b>Low</b><br>(Low Likelihood of Harm)       | <ul style="list-style-type: none"><li>• Low risk of an adverse effect on actual or prospective leaseholders.</li><li>• Public misled but little or no risk of actual adverse effect on individual(s)</li></ul>   |

The Council will define harm widely and the leaseholder(s) may suffer financial loss, damage to health or psychological distress (especially vulnerable cases). There are gradations of harm within all of these categories.

The nature of harm will depend on personal characteristics and circumstances of the leaseholder and the assessment of harm will be an effective and important way of taking into consideration the impact of a particular breach on the leaseholder.

In some cases, no actual harm may have resulted, and the Council will be concerned with assessing the severity of the misconduct; it will consider the likelihood of harm occurring and the gravity of the harm that could result.

## Step 2 – Starting points and category range

Having determined the category that the breach falls into, the Council will refer to the starting points and category ranges below to reach an appropriate level of financial penalty. The Council will then consider further adjustment within the category range for aggravating and mitigating features (step 3).

|                              |                    | Range   |         |
|------------------------------|--------------------|---------|---------|
|                              | Starting Point (£) | Min (£) | Max (£) |
| <b>Low/No Culpability</b>    |                    |         |         |
| Low Harm                     | 1,000              | 500     | 1,500   |
| Medium Harm                  | 1,500              | 1,000   | 2,000   |
| High Harm                    | 2,000              | 1,500   | 2,500   |
| <b>Medium Culpability</b>    |                    |         |         |
| Low Harm                     | 3,500              | 2,500   | 4,500   |
| Medium Harm                  | 4,500              | 3,500   | 5,500   |
| High Harm                    | 5,500              | 4,500   | 6,500   |
| <b>High Culpability</b>      |                    |         |         |
| Low Harm                     | 8,000              | 6,000   | 10,000  |
| Medium Harm                  | 9,500              | 7,500   | 11,500  |
| High Harm                    | 11,000             | 9,000   | 13,000  |
| <b>Very High Culpability</b> |                    |         |         |
| Low Harm                     | 15,000             | 11,000  | 19,000  |
| Medium Harm                  | 16,500             | 13,000  | 21,000  |
| High Harm                    | 22,500             | 15,000  | 30,000  |

## Multiple Breaches

A landlord, or person on their behalf, who commits multiple breaches in relation to the same lease is generally only liable to one financial penalty<sup>4</sup>. However, they will be liable for a further penalty if, having previously had a financial penalty imposed for an earlier breach, they then commit a further breach in relation to that same lease.<sup>5</sup>

<sup>4</sup> Section 9(3) [Leasehold Reform \(Ground Rent\) Act 2022](#)

<sup>5</sup> Paragraph 5.2 of the [DLUHC Statutory Guidance](#) and Paragraph 5.2 of the [Welsh Government Statutory Guidance](#)

Where a person has committed one or more breaches in relation to two or more leases, the Council may also choose to impose a single financial penalty in respect of all those breaches collectively<sup>6</sup>. If a single penalty is imposed in respect of multiple breaches, the amount of the penalty must not be less than the total minimum amount, and must not exceed the total maximum amount, that could or would have been imposed if each breach had been penalised separately.

### Obtaining financial information

The statutory guidance advises that obtaining financial information from the landlord may assist with considering what is an appropriate starting point and range, based upon the means of the landlord. In the case where the landlord is a corporate body, the Council may consider information available on its turnover or equivalent<sup>7</sup>.

The Council has investigatory powers under Schedule 5 of the Consumer Rights Act 2015 to investigate breaches of the Act.

### Step 3 - Aggravating and mitigating factors

Below is a list of some, but not all, factors that the Council can consider when assessing the value of a financial penalty. The Council will identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In particular, relevant unspent convictions are likely to result in a substantial upward adjustment. In some cases, having considered these factors, it may be appropriate to move outside the identified category range which will not exceed the statutory maximum permitted in any case.

| <b>Aggravating Factors</b><br>(Matters increasing severity)   | <b>Mitigating Factors</b><br>(Matters reducing severity)   |
|---|--|
| <ul style="list-style-type: none"> <li>• if the leaseholder is a vulnerable individual</li> <li>• the landlord's history of compliance or previous convictions related to the breach</li> <li>• whether the breach was motivated by financial gain</li> <li>• if there has been any obstruction of justice</li> <li>• any deliberate concealment of the activity or evidence</li> <li>• established evidence of wider / community impact</li> <li>• obstruction of the investigation</li> <li>• record of poor compliance</li> <li>• refusal of advice or training</li> </ul> | <ul style="list-style-type: none"> <li>• high level of co-operation with the investigation, beyond that which will always be expected</li> <li>• evidence of voluntary steps to remedy the breach, including prompt repayment of prohibited rent</li> <li>• evidence of health reasons preventing reasonable compliance (poor mental health, unforeseen health issues and/or emergency health concerns)</li> <li>• no previous breaches</li> <li>• good character and/or exemplary conduct</li> <li>• the landlord is a vulnerable individual, where vulnerability is linked to the breach being committed</li> <li>• acceptance of guilt</li> </ul> |

<sup>6</sup> Section 9(5) [Leasehold Reform \(Ground Rent\) Act 2022](#)

<sup>7</sup> Paragraph 6(4)(b) of [DLUHC Statutory Guidance](#) and Paragraph 6(4)(b) of the [Welsh Government Statutory Guidance](#)

## **Step 4 – Fairness and Proportionality**

The level of financial penalty should reflect the extent to which the conduct fell below the required standard. The financial penalty should meet, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived through the commission of the breach.

Factors that could be considered include:

- any other relevant financial information available, such as profit margin for a corporate body or a landlord's indebtedness. This should consider if the financial penalty would have a disproportionate impact on the landlord's ability to comply with the law in future or other unintended consequences (e.g., a landlord becoming at risk of losing their own home).
- wider financial impact on third parties (e.g., impact of employed of staff).
- totality principle: if issuing a financial penalty for more than one breach (relating to two or more leases), or where the landlord has already been issued with a penalty, the Council must consider whether the total financial penalties comply with the Act and are just and proportionate to the breaches.

A financial penalty covering multiple breaches must not cumulatively exceed the minimum and maximum limits for a penalty, as if each breach had been treated separately.

It should not be cheaper to breach the Act than it is to pay a financial penalty.

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## **Step 5 – Recovery Orders**

If the Council is satisfied, on the balance of probabilities, that a person has breached section 3(1) of the Act, and they have not refunded the leaseholder of any prohibited rent before the end of the period of 28 days beginning with the day after it is received, the Council may decide to issue a recovery order under section 10 of the Act.

The Council may serve a recovery order instead of, or in addition to, a financial penalty.

The Council cannot order a person to refund the prohibited rent if a leaseholder has made an application under section 13 of the Act to the Tribunal in relation to the same payment.

Where any part of two or more payments of a prohibited rent made by a leaseholder under the same lease has not been refunded, the Council may make a single order in respect of all the prohibited rent that has not been refunded.

## **Step 6 – Recording the decision**

The officer making a decision about a financial penalty and/or a recovery order will record their decision giving reasons for coming to the amount of financial penalty that will be imposed and any terms of a recovery order.

### **3. Issuing a Financial Penalty and/or Recovery Order**

#### **Notice of Intent**

After determining the level of financial penalty, and/or the need to issue a recovery order, the Council will issue a “Notice of Intent” on the landlord, or relevant person, within the time limits prescribed in the Act<sup>8</sup>.

A Notice of Intent will contain:

- the date on which the notice was served
- the amount of the proposed financial penalty or the terms of the proposed recovery order,
- the reason for imposing the penalty or making the order, and
- information about the right to make representations

#### **Written Representations**

A landlord or relevant person who receives a Notice of Intent will have a period of 28 days, beginning with the date on which the Notice of Intent was served, to make written representations about the proposal to issue a financial penalty and/or recovery order and the terms therein. The recipient of the notice will be given instructions on how to provide their written representations in response to the notice.

#### **Review of Financial Penalty and/or Recovery Order**

The Council will review any written representations received and consider any factors which indicate a reduction in the penalty, or withdrawal of the notice and/or order, is appropriate.

In so doing, the Council will have regard to the following factors relating to the wider impacts of the financial penalty on innocent third parties; such as (but not limited to):

- The impact of the financial penalty on the Landlord or Agent’s ability to comply with the law or make restitution where appropriate
- The impact of the financial penalty on the employment of staff, service users, customers and the local economy.

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<sup>8</sup> Schedule ss.3(1) [Leasehold Reform \(Ground Rent\) Act 2022](#)

The following factors will be considered in setting the level of reduction. When deciding on any reduction in a financial penalty, consideration will be given to:

- The stage in the investigation or thereafter when the offender accepted liability
- The circumstances in which they admitted liability
- The degree of co-operation with the investigation

The maximum level of reduction in a penalty for an admission of liability will be one third. In some circumstances there will be a reduced or no level of discount. This may occur for example where the evidence of the breach is overwhelming or there is a pattern of breaching conduct.

Any reduction should not result in a penalty which is less than the amount of gain from the commission of the breach itself.

The Council may consider amending the terms of any recovery order during this review.

### **Final Notice**

After the end of the 28-day period for written representations, the Council shall decide whether to issue a Final Notice detailing the value of the financial penalty and/or a recovery order. If a recovery order is included within the final notice, the Council can add interest to this payment at the rate prescribed under section 17 of the Judgments Act 1838<sup>9</sup> (8% per annum) from the day in which the prohibited rent payment was made.

The final notice will require a penalty to be paid to the Council and/or a recovery order to be complied with before the end of the period of 28 days beginning with the day after that on which the final notice is served.

The final notice will set out:

- the date on which the final notice is served
- the amount of the penalty or the terms of the order
- the reasons for imposing the penalty or making the order
- information about how to pay the penalty or comply with the order
- information about rights of appeal and
- the consequences of failure to comply with the notice

### **Withdrawal or amendment**

The Council may, at any time, withdraw or amend the notice of intent or final notice, including reducing the penalty amount, the penalty or requirement for a recovery order. Where doing so, the Council will write to the person on whom the notice has been served.

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<sup>9</sup> Section 11(4) [Leasehold Reform \(Ground Rent\) Act 2022](#)